Supreme Court, U. S.
FILED
DEC 30 1999
CLERK

No. 99-1078

In The

Supreme Court of the United States

PEGGY KERNAN, WARDEN,

Petitioner,

vs.

BOB HENRY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* COUNTY OF ORANGE, STATE OF CALIFORNIA SUPPORTING GRANT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*

The County of Orange, State of California, has more than 65,000 criminal prosecutions each year. Many of these cases involve issues of confession admissibility under this Court's various exclusionary rules. Misapplication of these exclusionary rules by the Ninth Circuit Court of Appeals on *habeas* review may cause unwarranted suppression of probative evidence, unnecessary retrial and, in some cases, acquittal of guilty perpetrators. Orange County has an interest in seeking correction of Circuit rulings that are at odds with this Court's precedents.

SUMMARY OF ARGUMENT

(1) Ruling on a *habeas corpus* petition from a state court murder conviction, the Ninth Circuit erroneously purported to grant relief on *Fifth* Amendment grounds, when the admissibility of the killer's confession for impeachment was solely an issue of *Fourteenth* Amendment due process. (2) The Ninth Circuit used the wrong test of voluntariness in deciding admissibility. (3) The inducement used by the interrogating officer was not so coercive as to undermine reliability of the confession or fairness of the jury's verdict. (4) Interrogation after a *Miranda* invocation neither violates the Fifth Amendment nor *ipso facto* renders a statement involuntary. (5) Once the killer testified, introduction of his prior inconsistent statement did not deprive him of a fair trial.

ARGUMENT

(1) Based on the facts that (a) a police officer asked Henry questions after his request for counsel and (b) the officer told Henry his answers could not be used against him "right now," the Ninth Circuit concluded Henry's murder confession was involuntary as a matter of law. So, said the Ninth Circuit, "We grant habeas relief on the Fifth Amendment claim."

Like Henry, the Ninth Circuit has its constitutional amendments confused. The introduction of an involuntary confession in a state court trial is not a *Fifth* Amendment error at all. Instead, the improper admission in evidence of an involuntary confession "violates the Due Process Clause of the *Fourteenth* Amendment." *Payne v. Arkansas*, 356 U.S. 560, 568 (1958) (emphasis added).

> [T]actics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the *Fourteenth* Amendment's guarantee of fundamental fairness. Indeed, even after holding that the Fifth Amendment privilege against compulsory self-incrimination applies in the context of custodial interrogations, . . . the Court has continued to measure confessions against the requirements of due process.

Miller v. Fenton, 474 U.S. 104, 110 (1985) (emphasis added) (citations omitted). *Accord Colorado v. Connelly*, 479 U.S. 157, 163 (1986).

Unfortunately, the Ninth Circuit's confusion of *Fourteenth* Amendment voluntariness law with *Fifth* Amendment self-incrimination law is chronic, infecting cases

involving both criminal admissibility issues and civil liability issues. *Compare Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (mixing Fifth and Fourteenth Amendment concepts in a *habeas* case), with *CACJ v. Butts*, 195 F.3d 1039 (9th Cir. 1999) (permitting state police officers to be sued under 42 U.S.C. § 1983 on a Fifth Amendment claim, based on allegations that interrogation rendered statements inadmissible under the Fourteenth Amendment). The present case affords the Court an opportunity to clarify the critical distinctions between self-incrimination and due process, and between *Miranda* violations and Fifth Amendment violations.

(2) In making its voluntariness calculation, the Ninth Circuit resorted to the "free will" analysis this Court specifically and unmistakably repudiated in *Connelly*, 479 U.S. at 169-170. The voluntariness standard embraced by the Ninth Circuit looks for compulsion "of whatever nature or however infused." But this Court said in *Connelly*, 479 U.S. at 168, that the voluntariness inquiry should focus on "the presence of police coercion." The Ninth Circuit's substitution of a "free will" examination in place of this Court's "official coercion" standard will cause voluntariness determinations to go awry, as in the present case. This mistake should be corrected before great damage ensues.

(3) The case at bench is not one where police mistreated a prisoner in order to extract a coerced confession. After informing Henry that "anything you say can and will be used against you in a court of law" (Page 4, Appendix E, Petition of the State of California for writ of certiorari), the officer merely told Henry after *Miranda* invocation, "What you tell us, we can't use against you

right now." At worst, this statement was misleading. But taken together with the warning that anything Henry said "can and will" be used in court, this assurance was hardly so coercive as to render his subsequent statement involuntary *as a matter of law*, so as to justify an appellate court in overturning the contrary findings of the trial court, which heard witnesses on the issue. The officer's statement hardly rises to the level of the inquisitorial techniques against which due process protects.

(4) But the Ninth Circuit also – and primarily – based its finding of involuntariness on the fact that the interrogating officer intentionally continued questioning after Henry's request for counsel. While this fact certainly would be relevant to the admissibility of statements in the prosecution's case in chief under *Miranda*, "since [Henry's] statements were not used as part of the prosecution's case in chief but only in impeachment, any violation of *Miranda* [ ] was irrelevant." *Mincey v. Arizona*, 437 U.S. 385, 410, fn. 2 (1978) (Rehnquist, J., concurring and dissenting).

This Court has plainly said, "A *Miranda* violation does not *constitute* coercion. . . . " *Oregon v. Elstad*, 470 U.S. 298, 306, fn. 1 (1985). And, "a *Miranda* violation 'does not mean that the statements received have actually been coerced, . . . '." *Arizona v. Fulminante*, 499 U.S. 279, 293, fn. 7 (1991) (plurality). In direct conflict with this understanding, the Ninth Circuit has declared in this case that "[T]he police's intentional violation of a suspect's *Miranda* rights by continued interrogation rendered any subsequent statements involuntary." (Citing *Cooper v. Dupnik*, 963 F.2d 1220, 1240-1241 (9th Cir. 1992) – another circuit opinion that improperly mixes Fifth and Fourteenth

Amendment concepts). Because the Ninth Circuit's equation of *Miranda* noncompliance with actual coercion violates this Court's precedent and amounts to Circuit nullification of this Court's rulings on admissibility for impeachment, this decision should be reversed.

(5) Although Henry's statement was introduced to impeach his inconsistent trial testimony, the Ninth Circuit found reversible error because no limiting instruction was given, and the prosecutor used the evidence in argument. Aside from the fact that Henry declined the trial judge's offered limiting instruction (for whatever tactical reason he may have had), the absence of such jury instruction is poor reason to overturn a criminal conviction. "A defendant's confession is . . . so damaging that a jury should not be expected to ignore it, *even if told to do so. . . .* " *Fulminante*, 499 U.S. at 292 (plurality) (emphasis added). "Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind, *even if told to do so.*" *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting) (emphasis added). This being the recognized reality, a limiting instruction in this case would have served no practical purpose in altering the outcome of the jury's deliberations; therefore, we confront a case in which a court of justice has ordered a murderer's release for no better reason than *pro forma* insistence on the performance of a meaningless ritual.